Supreme Court of the United States

JOHN H. BREDE,
Appellant,

against

JAMES H. POWERS, as United States Marshal for the Eastern District of New York.

APPELLANT'S REPLY.

Replying to Appellee's First Point.

This part of appellee's brief was written because the learned Assistant Attorney General wholly misconceived our theory. We do not take the position that the power of the court to send a short-term (*i. e.*, for a year or less) convict out of the state depends on whether the jails of the state "are open to receive United States prisoners" (appellee's brief, p. 4). We have not suggested that the *Karstendick* case is obsolete (*id.* p. 7). It is one of the authorities upon which we rely.

What we intended to say and believe we did say is this: Section 5546 (the one authorizing the Attorney General to designate a "suitable jail or penitentiary in a convenient State or Territory") is "a proviso to sections 5541 and 5542" (*Karstendick* case, p. 10), the sections determining when

the prisoner may be sentenced to "any State jail or penitentiary within the district or State." In all three sections the word "jail" means the same thing as "state prison" (*Karstendick* case, p. 401; *Mills* case, p. 271). That is, it is only when the statute *requires* hard labor or when the term of imprisonment is for *upwards of a year* that sentence may be to a "jail" (prison) or "penitentiary" either within or without the state.

Of course, Congress *could* give District Courts power to sentence short-term convicts to institutions beyond the limits of their ordinary jurisdiction, but it hasn't. The reason why it did not is plain. As a rule "propriety" requires that a prisoner should not be sent out of the state (*Karstendick* case, pp. 400-401), that is, he should not be imprisoned and banished, too. The shorter the term, *i. e.*, the smaller the offense, the more persuasive are the reasons why this should not be done. And although Congress was willing, when the facts justified, that a long-termer should be sent beyond the borders of his state they were unwilling that a short-termer should be so dealt with. If there happened to be no "suitable" place furnished by the state the United States could provide one (Sec. 5538). It didn't occur to Congress that the United States would be wholly at the mercy of the keepers of the local "old antequated" and "vermin-infested jails" (appellee's brief, pp. 17-18) unless it was fortunate enough to find the keeper of a jail in some other state who managed things better.

So we contend that the court below had no power to sentence appellant to an institution out of the state because the punishment provided by the statute is not of the character which permits that to

be done. The availability and "suitability" of the penal institutions of the State of New York have nothing to do with it. We described the character of those institutions because they are among the ones to which the court had the *power* to commit appellant.

Replying to Appellee's Third Point.

Here it is argued that a state statute imposing hard labor does not affect federal prisoners; that the word "disciplime" as used in section 5539 refers "to punishment for infraction of rules and regulations of the institution and 'treatment'" (appellee's brief, p. 12). That is, punishment meted out to insubordinate prisoners is "discipline," but punishment meted out regularly to all prisoners because the nature of the institution is penal, is not "discipline." That is not the way this court has construed the word:

> "If the offense is flagrant, the penitentiary with its *discipline* may be called into requisition" (*Karstendick* case, p. 399).

The contention seems to be that it is not the law of the state but the whim of the Attorney General which determines the character and extent of the "employment" imposed (appellee's brief, pp. 12-13). This is based upon R. S. 5547 which provides that the Attorney General shall contract for the "proper employment" of prisoners. That section was enacted as part of the Act of May 12, 1864, chapter 85 (13 Stat. 74). We do not think it was intended to repeat, in part, section 5539. Repeals by implication are not favored. What we think

it meant was this: the Attorney General had ruled not long before that under existing law state jailors could hire out the labor of federal convicts, and the money belonged to the state, nevertheless, the United States was required to pay the state for the prisoners' "nourishment and clothing * * * fuel and medical service * * * and ordinary wear and tear of the establishment" (8 Op. Atty. Gen. 289). We think that this part of section 5547 was intended to remedy that situation. It was intended to make the disposition of the revenue derived from the labor of the convicts a matter of contract. It was not until twenty-three years afterward that the hiring out of federal prisoners was forbidden (Act of February 23, 1887, ch. 213).

However this may be, if it be the fact that the Attorney General can contract for whatever kind and amount of "employment" he pleases—if this sentence, though *on its face* to a county jail in New Jersey can be changed at the Attorney General's whim to one in some other state where flogging will be substituted for work (appellee's brief, p. 11), how can anyone seriously say that *any* sentence of imprisonment meted out by a United States court is not infamous?

Finally, it is concluded that "the attribute of infamy (hard labor) must be put in the statute by Congress and made by the sentencing judge a part of the public record" (*id.* p. 21). That is, infamy doesn't depend upon *punishment* but upon *ink; words* and not *realities* control. If it be necessary to dispose of such a theory, this court has already done it:

> "An offense which the statute imperatively requires to be punished by imprisonment

'at hard labor,' and one that must be punished by 'imprisonment,' but the sentence to which imprisonment the court may, in certain cases, and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are, 'punishable' by imprisonment at hard labor" (*Mills* case, p. 266).

Dated, October 1, 1923.

Respectfully submitted,

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of Counsel for Appellant.